IN THE

Supreme Court of the United States

October Term, 1943

No. 1051 111

MARY STEVENS BAIRD,

Petitioner,

—*v.*—

ARTHUR H. FRANKLIN, Treasurer of the New York Stock Exchange, an Unincorporated Association of More Than Seven Persons.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Mary Stevens Baird respectfully prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Second Circuit affirming a judgment of the District Court for the Southern District of New York dismissing the complaint in the above entitled case.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 394-~~415~~ 411) which, by a divided court, affirmed the judgment of the District Court (R. 380 entered without opinion on findings of fact and conclusions of law, R. 341-358), is reported in 141 F. (2d) 238.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 27, 1944 (R. 413). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. §347 (a)) as amended by the Act of February 13, 1925, 43 Stat. 938; and under the Securities Exchange Act of 1934; June 6, 1934, c. 404 §27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921 (15 U. S. C. A. §78(aa)).

Questions Presented.

1. This case presents for the first time the important federal question whether a registered national securities exchange "controls" its members within the meaning of Section 20(a) of the Securities Exchange Act. That Section provides that "Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, * * *".

The question arises upon the following basic facts. Petitioner was a customer of Richard Whitney and his firm, Richard Whitney & Co., members of the New York Stock Exchange. The business of Whitney and his firm was conducted in violation of the requirements of the Securities Exchange Act. Notice of such illegal conduct came to the attention of the New York Stock Exchange. In violation of its plain statutory duty the Exchange failed to expel, suspend or discipline Richard Whitney and Richard Whitney & Co. for "conduct or proceedings inconsistent with just and equitable principles of trade". Thereafter Richard Whitney and Richard Whitney & Co., while still members

in good standing of the New York Stock Exchange, fraudulently converted petitioner's securities. Petitioner asserts that respondent is liable jointly and severally with, and to the same extent as, Richard Whitney and Richard Whitney & Co.

2. Did the Circuit Court of Appeals for the Second Circuit commit reversible error in failing to apply to the facts of this case the doctrine announced by this Court in *The Pennsylvania*, 19 Wall. 125 (1873), it appearing that such application would render more effective the protection intended to be given to investors by the Securities Exchange Act.

In *The Pennsylvania* this Court pointed out that if a particular injury has been accompanied, and may have been caused, by a violation of a duty created in order to prevent such injuries, it is only a reasonable presumption that the violation was at least a contributory cause of the injury; and, accordingly, the burden in such a case rests upon the wrongdoer to show that his wrong not merely "might not have been one of the causes, or that it probably was not, but that it could not have been".

Application of that doctrine to the facts of this case would require a reversal of the judgment of the Circuit Court of Appeals for the Second Circuit.

The failure of the Circuit Court of Appeals to follow the decision of this Court in *The Pennsylvania, supra,* also probably conflicts with the decision of the Circuit Court of Appeals for the Tenth Circuit in *H. W. Bass Drilling Co.* v. *Ray,* 101 F. (2d) 316 (1939).

3. Did the Circuit Court of Appeals for the Second Circuit commit reversible error in holding that the New York Stock Exchange was not liable in damages on the sole ground that since the petitioner's securities were pledged on and prior to November 24, 1937, and thereafter were

released from pledge for but very short intervals, it was, in the absence of any further showing, a matter of pure speculation whether, if the Exchange had acted on November 24, 1937, the petitioner would have been able to retrieve her securities? (*Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 1931.)

The record shows (a) violation by the New York Stock Exchange, on and after November 24, 1937, of the duty it owed petitioner to expel, suspend or discipline Richard Whitney and Richard Whitney & Company when it learned that, in violation of the Securities Exchange Act and of the rules of the Exchange, they were illegally converting securities deposited with them by investors, (b) that thereafter, on January 26 and 28, 1938, petitioner's securities were in the hands of Whitney and his firm and were illegally pledged by them to secure loans to them from the Public National Bank and the New York Trust Company, respectively, and (c) that certain of the pledged securities were sold to satisfy these loans.

The day to day values of petitioner's securities at all material times were established by stipulation.

The Circuit Court of Appeals held that the damage suffered by petitioner had not been established with sufficient certainty, the Court stating: "It appears from the Record that by reason of unauthorized pledges the securities had all been converted prior to November 24, 1937, and were then in the possession of pledgee banks and so remained for some time thereafter, though at certain times all of them were returned to the pledgor and during the same day repledged to secure other loans. We can see no likelihood that the expulsion or suspension of Richard Whitney when his conversions came to the notice of the officers of the Exchange on November 24, 1937, would have in the least benefited the plaintiffs for the securities were then all converted and in the hands of pledgees" (R. 390 (1049)). This

holding would require petitioner not only to show that on January 26 and 28, 1938, her securities were in the hands of and were converted by Richard Whitney and that this conversion caused her the partial loss established by the evidence, but also to establish whether and to what extent the securities that Whitney had theretofore illegally pledged would have been lost to her, assuming, contrary to the fact, that on November 24, 1937 the Exchange had suspended, expelled or disciplined Whitney.

Statute Involved.

The applicable provisions of the Act of June 6, 1934 c. 404, §1, 48 Stat. 881 (15 U. S. C. A. §78(a)) known as the Securities Exchange Act of 1934, are set out in the Appendix to this petition.

Statement.

This action arises under the Securities Exchange Act of 1934. It was brought to recover the damages which petitioner sustained by reason of the illegal hypothecation of her securities, in January 1938, by her brokers Richard Whitney and Richard Whitney & Co., members of respondent New York Stock Exchange.

The action is based upon the failure of respondent, when apprised in November 1937, that Whitney and his firm were violating the Act and respondent's own rules, to take any action to suspend, expel or discipline them as required under Section 6(b) of the Act, and also upon respondent's breach of its contract entered into under Section 6(a)(1) of the Act "to comply, and to enforce so far as is within its powers compliance by its members" with the Act. Petitioner also contends that under Section 20(a) of the Act, respondent's failure in good faith to enforce compliance with the Act by Whitney also rendered it liable co-extensively with Whit-

ney and his firm for the damages which she sustained by the latters' violations of the Act.

(A) *The Facts.*

Between November 24, 1937 (and some months prior thereto) and January 28, 1938 Richard Whitney and Richard Whitney & Co. illegally, and without petitioner's knowledge or consent, pledged the securities which she had in a safekeeping account with said brokers, in a series of bank loans. The last of said loans, made on January 26 and 28, 1938, were foreclosed for nonpayment shortly after March 8, 1938 when Whitney and his firm were suspended from the respondent Exchange for inability to meet their commitments.

In and prior to November 1937 the Exchange itself, through the Trustees of its Gratuity Fund,[1] was also a customer of Richard Whitney and Richard Whitney & Co. On November 23, 1937 certain of said Trustees, who were also officers of the Exchange, learned that Whitney and his firm had misappropriated $221,000 in cash placed by the Trustees in their hands for investment, and, as the Circuit Court of Appeals found, at the same time learned facts from which they had reason to believe that Whitney and his firm had stolen $900,000 in securities belonging to the Fund then in their custody as brokers for the Fund, had been sending through the mails false statements of the Gratuity Fund account in aid of their hypothecations, and also were operating with less than the margin of liquid capital required by the Act.

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1 Under its Constitution the Exchange maintained a fund, known as the Gratuity Fund, which amounted in 1937 to some $2,000,000 in cash and securities, for the benefit of the families of deceased members. It was managed by seven Trustees "acting as agent for the Exchange" (Plff's Ex. 2B, pp. 6-69, R. 71).

By prompt and firm action, the Exchange succeeded in obtaining the return of its cash and securities. Thereafter the Exchange deliberately (R. 136, 206) took no further action of any sort on the knowledge which it had thus received (R. 163), with the result that Whitney and his firm continued illegally pledging the petitioner's securities, as he had the respondent's, until the major portion of her securities were sold by the banks with which they had been unlawfully pledged.

During nine months before November 22, 1937, Whitney and his firm had purchased $700,000 in securities for the account of respondent's Gratuity Fund, in the course of a large re-investment program, and had also received from the Fund an additional $421,000 in cash and securities for purposes of reinvestment (Pltff's Exs. 22, 24, 30, R. 284, 286, 299). The monthly statements of account mailed to the respondent during this period indicated that its cash and securities were in the custody of Whitney and his firm free of any lien or claim (Pltff's Ex. 34, R. 305-315). Actually, Richard Whitney and Richard Whitney & Co. had unlawfully pledged these securities with the Corn Exchange Bank Trust Company to secure loans to themselves, and had misappropriated the cash (Pltff's Ex. 14, R. 260-261; R. 109, 210-212). The clerk of the Fund had, on at least five occasions during this time, asked Whitney to return the securities, but he had not done so (R. 99). Finally, on November 22, 1937, immediately following a special meeting of the Trustees of the Fund, E. H. H. Simmons, Chairman of the Trustees and a member of respondent's Board of Governors, called Whitney and demanded return of the securities and also the cash (R. 98, 110, 189, 190).

The following day Whitney came to Simmons and requested another day to meet the demand (R. 112, 191-193). Simmons refused (R. 112, 192). Whitney returned later in the day saying that he would return the cash and securities the next day and that, if Simmons needed any as-

surance, he had been over to see his brother George Whitney, then a partner of J. P. Morgan & Co. (R. 119, 194, 195). Simmons, as the result of these occurrences, then admittedly knew that Whitney had misappropriated the cash (R. 210-212) would, unless assisted by his brother, be suspended from the Exchange the next morning (R. 197, 208, 209), and, as found by the Circuit Court of Appeals, at least had reason to believe that Whitney had also stolen the securities. However, now knowing that George Whitney was aiding his brother, Simmons granted the additional time requested (R. 198).

The next day George lent his brother Richard the money necessary to pay the cash and redeem the securities, and the Exchange escaped without loss (R. 120, 121, 199, 200).

While respondent thus rescued its own property, petitioner's securities, which were, on November 22, 1937 also illegally pledged, a large portion with the Corn Exchange Bank Trust Company as were the respondent's, remained so pledged for some time (Pltff's Ex. 14, R. 267-273).

Misled, as had been the respondent, by the false statements sent her by Whitney (Pltff's Ex. 15, R. 69, 70 (not printed); Pltff's Ex. 14, R. 261), petitioner did not learn of the theft of her securities until after Whitney's collapse on March 8, 1938 (R. 68-70).

In the interim petitioner's securities had been pledged and repledged by Whitney in a succession of loans culminating with two loans on January 26 and 28, 1938 (Pltff's Ex. 14, R. 267-273) under which her securities were finally sold.

The only proof made by petitioner as to her damages was the market value of her pledged securities on each of the days between November 24, 1937 and the day on which the securities were finally sold[2]; the days on which her

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2 By stipulation, Plaintiff's Exhibit 46, offered and received at trial (R. 233), but not included in Record on Appeal.

securities were pledged between (and also prior to), November 24, 1937 and the final pledges on January 26 and 28, 1938, and the banks with which such securities were pledged (Pltff's Ex. 14, R. 267-273). Petitioner also showed that at some time during 22 of the 54 business days between November 24, 1937 and January 28, 1938 certain portions of her securities were redeemed from pledge by Whitney or his firm and were then in their possession and control before being repledged (Pltff's Ex. 14, R. 267-273; R. 148, 150, 152).

Respondent rested at the close of petitioner's case.

(B) ***Decision of the Circuit Court of Appeals.***

The Circuit Court of Appeals, reversing contrary findings made by the District Court, found (R. ~~405-406 (958-959)~~ 203) that:

> "* * * on or about November 24, 1937, the Stock Exchange had knowledge that Richard Whitney or Richard Whitney & Co. was guilty of conduct inconsistent with just and equitable principles of trade, within the meaning of the Securities Exchange Act of 1934 and the Rules and Regulations of the Stock Exchange, in that he had converted to his own use cash belonging to the Gratuity Fund, had hypothecated for personal loans securities owned by that Fund, had failed to maintain the credit balance required by §8(b) of the Act, and had issued through the mails false statements regarding the Gratuity Fund account, in violation of §10(b) of the Act."

The Circuit Court of Appeals also concluded that when the Exchange, possessed of such knowledge, failed to take action to discipline Whitney, it clearly violated its duty implied in Section 6(b) of the Act to enforce its required rules: that this duty was imposed for the protection of in-

vestors and that the petitioner, as a member of that class, was entitled to maintain her action for damages resulting from breach of that duty.

Having so concluded, the Circuit Court stated it was unnecessary to consider the petitioner's second and alternative cause of action, namely, that the Exchange, in failing to act, also breached its express contract under Section 6(a)(1) of the Act; nor did the Court pass explicitly on the petitioner's contention that under Section 20(a) of the Act the Exchange as a person in control of its member Whitney had become liable to the petitioner, jointly with, and to the same extent as, Whitney, for the damages caused her by Whitney's violations of the Act.

A majority of the Circuit Court of Appeals, nevertheless, voted for affirmance of the judgment below, on the sole ground that since the petitioner's securities were pledged on and prior to November 24, 1937, and thereafter were released from pledge for but very short intervals, it was, in the absence of any further showing, a matter of pure speculation whether, if the Exchange had acted on November 24, 1937, the petitioner would have been able to retrieve her securities.

Judge Clark dissented and voted for reversal, concluding that the legal damage to the petitioner occurred as a result of the illegal repledging of her securities by Whitney *after* the Exchange was on notice of Whitney's illegal activities; that by establishing that the Exchange had knowledge of Whitney's illegal activities and had failed thereafter to discharge its statutory duty to check such activities and establishing her ultimate loss, the petitioner had made out a *prima facie* case. In his opinion, Judge Clark pointed out (R. [illegible]) that petitioner's difficulty in establishing the precise extent of her damages was solely attributable to the respondent's own wrongful failure to act, and that an exchange, once under a duty to act, should not by delaying,

or refraining from, action thereby be able to enhance its own chances of escape from the assertion of liability by those for whose protection it was under a duty to act.

Specification of Errors To Be Urged.

1. The Circuit Court of Appeals erred in holding that on the record presented the respondent was not liable to petitioner under the provisions of Section 20(a) of the Securities Exchange Act.

2. The Circuit Court of Appeals erred in failing to hold that to avoid liability for petitioner's loss, respondent was required to show that her loss was inevitable, even if respondent had performed its duty.

3. The Circuit Court of Appeals erred in holding that the petitioner on the record presented had not made out a prima facie case of damage proximately caused by the failure of the Exchange to take action against Whitney on or after November 24, 1937.

4. The Circuit Court of Appeals erred in failing to reverse the judgment below.

Reasons for Granting the Writ.

I.

In deciding that respondent was not liable jointly and severally with, and to the same extent as, Richard Whitney and Richard Whitney & Co., for their violations of the Act, the Circuit Court of Appeals has decided an important question of Federal law as to the interpretation of Section 20(a) of the Act which has not been, but should be settled by this Court.

Section 20(a) provides:

> "Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

The Courts below did not expressly pass on petitioner's contention, that the respondent exchange was liable jointly and severally with Whitney and his firm, under Section 20(a) of the Act. Liability *in solido* with Richard Whitney and Richard Whitney & Co. for their violation of the Act, both under Section 20(a) and at common law, was, nevertheless, asserted. Since such liability was asserted, the decision in respondent's favor necessarily includes a decision that respondent is not liable under Section 20(a). The opinion below being silent, the exact basis for this decision can be arrived at only by a process of elimination.

The Circuit Court of Appeals concluded that the earlier illegal pledgings of the Exchange's own securities, effectuated by means of false statements mailed to the Exchange, violated Sections 10(b), 8(c) and 8(d) of the Act. Thus, its decision that the Exchange was not liable under Section 20(a) could not have been based on any doubt that Whitney's final pledges of petitioner's securities, on January 26 and 28, 1938, and like mailing of false monthly statements to the petitioner, did not also violate the Act. Indisputably, as far as Richard Whitney and his firm are concerned, those violations of the Act caused, in a legal sense, petitioner's entire loss on foreclosure of the final pledges, and their

liability for the full amount of that loss is beyond dispute.

It can hardly be supposed, moreover, that the Circuit Court of Appeals considered the Exchange's inaction, when under a duty to act, and knowing that Whitney had been violating the Act in the most dishonest manner, to be consistent with good faith on the Exchange's part.

We thus reach the conclusion that the Circuit Court of Appeals must have decided that respondent did not "control" Richard Whitney and Richard Whitney & Co. within the meaning of Section 20 (a).

The term "control" is left undefined so that it must be given that meaning which will best effectuate the Congressional purposes in imposing a vicarious liability on controlling persons.

United States v. *Marshall Transport Co.*, 321 U. S.
(No. 589.—October Term, 1943.)

Plainly, these were the same purposes which led to the adoption of the Act as a whole.

One of the prime purposes of the Congress, repeatedly declared throughout the Act, was to establish standards of conduct, for brokers and dealers in securities, which would protect their customers against their dishonesty, overreaching, or mere insolvency. To ensure adherence to these standards, duties were imposed on these brokers and dealers, for violations of which they are expressly or impliedly required to respond in damages. And a vicarious liability is imposed, by Section 20(a), on persons "controlling" these brokers and dealers, if in bad faith they fail to prevent, or if they actively induce, such violations of the Act.

The only "control" in which Congress could have been interested, when it imposed this vicarious liability, was the power to enforce adherence to the statutory standards and prevent violations of the correlative statutory duties. This

is precisely the control which exchanges are required to have and to exercise over their members. An exchange is required, by Section 6(b), to set up, and in appropriate cases to invoke, machinery for policing its members' compliance with the Act and other aspects of their business conduct. Under Section 6(a)(1) an exchange must undertake, so far as within its powers, to enforce its members' compliance with the Act. Section 6(d), provides no exchange may be registered under the Act unless its disciplinary rules are "just and adequate to insure fair dealing and to protect investors." All of these requirements were imposed to effectuate through the medium of the exchanges the regulation and "control" over their members' transactions which Section 2 expressly states the Act was intended to establish, in order, among other things, to protect investors.

The record clearly shows that the rules of respondent Exchange, if enforced, were just and adequate to insure fair dealing and to protect investors (Plff's Exs. 2A, 2B; Plff's Ex. 14, R. 259, 260); that respondent Exchange had set up machinery to police its members' business conduct in respect of their compliance with the Act and otherwise; and that by virtue of this machinery and these rules, the Exchange in fact had, and in most cases exercised, the requisite degree of control over the conduct of its members in their dealings with investors (R. 153, 154; 264-266).

Legislative history confirms the view that, as employed in Section 20(a), the term "control" was intended to be given whatever breadth of definition would best effectuate the purposes of the Act.

In some contexts the term means "legally enforceable control", but legislative history makes it entirely clear, that it was not so employed here. The House Committee Report (No. 1383, 73rd Cong. 2d Sess.), referring to *Handy & Harman* v. *Burnet,* 284 U. S. 136 (1931), expressly states (at

p. 26) that the term "control" as here employed is intended to include actual control, as well as what has been called "legally enforceable control".

The House Committee Report also makes it clear (at p. 26) that the term "control" was intended to have the most extended application possible, and that the Committee made no attempt to define it for the very reason that no definition could anticipate all of the possible ways in which control might be exercised.

Imposing liability on the Exchange, as a controlling person, for failure to exercise its control in good faith will create no hardship and inflict no injustice. On the contrary, in so doing, Section 20(a) merely conforms the legal duty of controlling persons to what has always been held to be their moral duty,—surely, as we understand it, an end properly to be achieved by legislation, and especially in the case of an exchange, which is forbidden to operate as an exchange unless it is in a position to control its members' conduct in their dealings with investors.

II.

In deciding that petitioner had failed to sustain the burden of proving that respondent's failure to perform its statutory and contractual duty contributed to her loss, it appearing that petitioner's injury may have been caused and was accompanied by such violation of the duty owed by respondent to petitioner to protect her against such injuries, the Circuit Court of Appeals has decided, in a way probably in conflict with applicable decisions of this Court, an important question of federal law which, if not settled by those decisions, has not been, but should be, settled by this Court. The decision of the Circuit Court of Appeals on this issue also probably conflicts with the decision of the Circuit Court of Appeals for the Tenth Circuit in *H. W. Bass Drilling Co.* v. *Ray*, 101 F. (2d) 316 (1939).

Although it knew on November 24, 1937 that its member Richard Whitney and his firm were violating the Securities Exchange Act of 1934 and its rules, respondent took no action to enforce their compliance with the Act or with its rules for more than three months. In failing to act sooner, respondent failed, as the Circuit Court of Appeals decided, to perform a duty impliedly imposed on it by the Act, in order to give customers of its members protection against injury from such members' violations of the Act and of respondent's rules required by the Act. Respondent's inaction was likewise a failure to perform a contractual duty assumed by it in its registration statement, for the same purpose.

Respondent's failure to perform these duties made possible the pledges of January 26 and 28, 1938, under which petitioner's securities were sold and was thus a cause in fact of the injury she actually suffered. Respondent nevertheless contended in the courts below that its violation of the Act, and of its contract, was not a proximate cause of petitioner's loss, arguing that even if respondent had acted when it first should have acted, petitioner's securities would probably have been lost to her under an earlier pledge. The majority of the Circuit Court of Appeals has so held and has affirmed the judgment of the District Court solely on this basis.

The effect of this holding by the Circuit Court of Appeals was to place on petitioner the burden of proving that she would not have suffered, in another way, if respondent had done its duty, the same loss which actually she did suffer because respondent had failed to do its duty.

We respectfully submit that under this Court's decision in *The Pennsylvania,* 19 Wall. 125 (1873) the burden of proof should instead have been placed on respondent, as the wrongdoer, to show, if it could, that petitioner would necessarily have suffered the same loss whatever respondent

might have done. As this Court pointed out in that case, if a particular injury has been accompanied, and may have been caused, by a violation of a duty created in order to prevent such injuries, it is only a reasonable presumption that the violation was at least a contributory cause of the injury; and, accordingly, the burden in such a case rests upon the wrongdoer to show that his wrong not merely "might not have been one of the causes, or that it probably was not, but that it could not have been".

The classic statement of the principle which this Court applied in *The Pennsylvania, supra,* and which we submit the Circuit Court of Appeals should have applied in the case at bar, is to be found in *Davis* v. *Garrett,* 6 Bing. 716 (C. P. 1830):

> "But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case."

See also:

> *The Aakre,* 122 F. (2d) 469 (C. C. A. 2d, 1941); *Morrison* v. *Shaw* [1916] 2 K. B. 783, 795.

Uncertainty created by respondent's wrongdoing it must, then, dispel at its peril to the extent of showing, as *Davis* v. *Garrett* puts it, that even if it had acted sooner, petitioner

must have suffered the same loss. On this Record, it is clear that no such showing has been made by petitioner. And it would seem that no such showing could ever be made by petitioner, since no one can say with certainty whether petitioner would have sustained any loss or what the amount of her loss would have been if respondent had acted earlier.

In *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96 (1886) this Court held that delay in notifying a bank of a forgery was enough to prevent an account stated from being opened up because it was impossible to say that the forger could not have made good the bank's loss, perhaps with the help of his family and friends, if the bank had known about the forgery sooner.

Similarly, in *State Street Trust Co.* v. *Ernst*, 278 N. Y. 104 (1938), the New York Court of Appeals held that proof of continuance of a loan in reliance upon a false balance sheet certified by defendant accountants made out a *prima facie* case of loss occasioned by certification of the false balance sheet, even though the credit had already been extended when the certification was made and (as in the case at bar) the pleadings established that the borrower was then insolvent.

Moreover, it can be urged with much force that even if respondent could do so successfully, respondent is estopped in the case at bar to deny that timely action by it would have saved petitioner harmless.

Respondent successfully recovered its own cash and securities on November 24, 1937, when they had been misappropriated and illegally pledged by Richard Whitney and his firm in the Corn Exchange Bank Trust Company. At this same time a large portion of petitioner's securities were also illegally pledged at the same bank. Respondent concealed from petitioner, when under a duty to her to take action that would have made the situation known, that

Richard Whitney and his firm had illegally pledged her securities and were unable (if they were then unable) to return them to her on demand. Respondent should not now be allowed to deny, what by its silence it then tacitly asserted: that on and after November 24, 1937, and at least until January 28, 1938, Richard Whitney and Richard Whitney & Co. were able to return petitioner's securities on demand, especially when they had proved able to return respondent's securities. (*Leather Manufacturers' Bank* v. *Morgan, supra.* See also *Va. Sec. Corp.* v. *Patrick Orchards,* 20 F. [2d] 78 [C. C. A. 4, 1927] and *Comm. National Bank* v. *Nacogdoches Co.,* 133 Fed. 501 [C. C. A. 5, 1904].)

Although *The Pennsylvania* (*supra*) was an admiralty case, neither it nor *Davis* v. *Garrett* (*supra*) was based on principles peculiar to the maritime law, and other courts have considered the principles there applied equally applicable in non-maritime cases.

H. W. Bass Drilling Co. v. *Ray, supra;*
Martin v. *Herzog,* 228 N. Y. 164 (1920);
U. S. Trust Co. v. *O'Brien,* 143 N. Y. 284 (1894);
A/S Rendal v. *Arcos, Ltd.,* 106 L. J. K. B. [N. S.] 756 (1937);
cf. *State Street Trust Co.* v. *Ernst, supra.*

Allocation of the burden of proof will in most cases determine whether the statute or contract involved will give the substance or merely the shadow of the protection it was designed to afford.

By placing that burden on petitioner, the majority of the Circuit Court of Appeals has deprived her of any real protection and relieved respondent of any real responsibility under the Act, or respondent's contract. As Judge Clark in his dissent pointed out (R. ~~413-4 (966-7)~~ 468):

"* * * Any other rule [i.e., other than the rule for which petitioner contends] seemingly imposes little responsibility upon the Exchange for carrying out the duty which we have found the Act to place upon it, and even provides an incentive, after the Exchange has become aware of a serious condition, for it to let matters drift, while it and its members having special knowledge protect themselves just as they did here—a result which, to my mind, borders on the immoral, in that it encourages a fiduciary to safeguard its own private interests while it allows its beneficiaries to suffer."

III.

In holding that the New York Stock Exchange was not liable in damages on the sole ground that since the petitioner's securities were pledged on and prior to November 24, 1937, and thereafter were released from pledge for but very short intervals, it was, in the absence of any further showing, a matter of pure speculation whether, if the Exchange had acted on November 24, 1937, the petitioner would have been able to retrieve her securities, the Circuit Court of Appeals has decided a question of federal law in a way probably in conflict with applicable decisions of this Court.

Petitioner proved her ownership of the securities she lost, their values at all material times (R. 233), that they were unlawfully pledged on January 26 and 28, 1938, that certain of them were sold to satisfy the loans for which they were pledged and others recovered by petitioner, and that petitioner was also entitled to a share in $5,376.79 proceeds of excess collateral sold.[3]

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3 Plaintiff's Exhibit 14, Record 263. Plaintiff's pro rata share in such securities has since been fixed at $1550.67 by judgment in *New York Yacht Club* v. *Central Hanover Bank & Trust Co.*

There can be no doubt, that no matter who had the ultimate burden of proof, petitioner by this proof made out a *prima facie* case for recovery of the full amount of her loss,—that is, that she proved facts entitling her to judgment in that amount, unless additional facts were proved showing that no damage or a lesser amount of damage had resulted from respondent's wrong.

Certain additional facts were proved:

First, it was proved that petitioner's securities were pledged with other banks on November 24, 1937, and on some part of every day thereafter, until their final pledge. (Plff's Ex. No. 14, R. 267-273.) (But there was no proof as to the amount of the loans for which the pledges were made, the amount of other collateral lawfully pledged to secure them, or even as to whether the pledgees were holders in due course of petitioner's securities. And it was proved that part or all of petitioner's securities were in the hands of Whitney and his firm during part of each of 22 out of the 52 business days between November 24, 1936 and January 26, 1938. (Plff's Ex. No. 14, R. 267-273; R. 148, 150, 152.))

Second, it was alleged in the complaint, although denied in the answer that on November 24, 1937 the Exchange knew that Whitney and his firm were insolvent (R. 7-12, 27-29, 37, 40, 42, 45, 54-57). (But there was no proof as to the extent of their insolvency at any time, as bearing on their ability either to redeem petitioner's securities from previous pledges or to respond in damages. And it was proved, that Richard Whitney was able to borrow from his brother George on November 24, 1937, the amount necessary to redeem respondent's securities and repay respondent's cash which he and his firm had misappropriated. And it was also proved that Richard Whitney and Richard Whitney & Co. were able to redeem petitioner's securities from each of their earlier pledges: i.e., by proving that they did in fact redeem them.)

It may be, that the Circuit Court of Appeals unconsciously assumed that "insolvency" might be equated to a complete lack of assets and borrowing ability, and "pledge" equated to certain loss. Its decision not to order a new trial would seem to indicate that something of the sort must have occurred. But the fact remains, that neither of these assumptions can be regarded as axiomatic and there is nothing in the Record to indicate that either, and much to indicate that neither, of them could justifiably be made in the case at bar.

If one wishes to speculate, the more probable assumption is, that some, at least of the earlier pledges would have resulted in no loss at all to petitioner:

Whitney and his firm were personally obligated to exonerate petitioner's securities, and if called upon to do so, might have responded, even though insolvent.

Petitioner was entitled to exoneration or indemnity from securities lawfully pledged along with her securities.[4] In those instances where the security lawfully pledged was enough to cover the loan, the unlawful pledge of petitioner's securities subjected them to no real burden. Even under the final pledges of January 26 and January 28, petitioner got back in this way a quarter of what she had at stake, and if certain of the other securities involved had not been illegally pledged she would have fared still better,—in itself a sufficient answer to the suggestion that "pledge" meant necessarily a total loss.

Finally, an illegal pledge imposes no burden at all, unless the pledgee is a holder in due course, as presumptively he is not.

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4 Under *Asylum of St. Vincent de Paul* v. *McGuire*, 239 N. Y. 375 (1925) petitioner was also entitled to contribution in equity from securities of others unlawfully pledged along with hers to the extent that she bore more than her pro rata share of the loss.

Nevertheless, it must be conceded that proof of these additional facts did create some uncertainty as to the extent of petitioner's damage.

Assuming, for the sake of the present argument, that respondent did not "control" Whitney, and was not required to show that its wrong could not have contributed to petitioner's loss, the burden of going forward with evidence to resolve this uncertainty logically must rest on whichever party should bear the risk of the uncertainty. Since the uncertainty was created by respondent's wrongful act, the decision of this Court in *Story Parchment Co.* v. *Paterson Co.* (282 U. S. 555, 1931) requires that respondent bear this risk, and the decision of the Circuit Court of Appeals placing it on petitioner is, we submit, in conflict with that decision.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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